

This Opinion is not a
Precedent of the TTAB

Mailed: April 20, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re GO & Associates, LLC

—
Serial No. 88944728

—
Paul W. Kruse of Spencer Fane LLP,
for GO & Associates, LLC.

Andrea Hack, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

—
Before Lykos, Goodman and Pologeorgis,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

GO & Associates, LLC (“Applicant”) seeks registration on the Principal Register of the mark EVERYBODY VS RACISM (in standard characters) for the following goods and services:

Tote bags, in International Class 18; and

T-shirts, hoodies as clothing, tops as clothing, bottoms as clothing, and headwear, in International Class 25; and

Promoting public interest and awareness of the need for racial reconciliation and encouraging people to know their

neighbor and then affect change in their own sphere of influence, in International Class 35.¹

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§1051-1053, 1127 because the applied-for mark is a widely used social or political slogan that does not function as a trademark or service mark to indicate the source of Applicant's goods and services and to identify and distinguish them from others.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant has requested judicial notice of Kacey Musgrove's Twitter posts and follower metrics and embedded the excerpts in its brief. The Examining Attorney has objected to this "new evidence."

The Board does not take judicial notice of Twitter pages. *Cf. In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016) (on appeal, Board will not take judicial notice of statements from commercial websites that do not constitute

¹ Application Serial No. 88944728 was filed on June 2, 2020 based upon Applicant's claim of first use anywhere and use in commerce since at least as early as June 2020 for Classes 18 and 25 and at least as early as May 2020 for Class 35 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

Applicant's brief is at 4 TTABVUE; the Examining Attorney's brief is at 6 TTABVUE.

dictionary definitions); *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1874 (TTAB 2011) (rejecting request for judicial notice of web pages). The request for judicial notice is denied.

To the extent these Twitter posts and analytics otherwise would be a submission of new evidence, the Examining Attorney's objection is sustained, and the Twitter excerpts will not be considered. *See In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) (evidence "submitted with Applicant's appeal brief that Applicant did not previously submit during prosecution is untimely and will not be considered."), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019). *See also* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) ("The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.").

II. Failure to Function as a Mark

"The Trade-Mark Act is not an act to register words but to register trademarks. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration." *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). A "trademark" is defined as "any word, name, symbol, or device or any combination thereof ... to identify and distinguish [a person's] goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." Trademark Act Section 45, 15 U.S.C. § 1127. A "service mark" is defined as "any word, name, symbol, or device, or any combination thereof ... to identify and

distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown.”

Id.

Not every word, phrase, or slogan identifies and distinguishes one brand or service from another. *See D.C. One Wholesaler v. Chien*, 120 USPQ2d 1710, 1713 (TTAB 2016) (citing *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010)) (“not every designation adopted with the intention that it perform a trademark function necessarily accomplishes that purpose.”). Slogans and other terms that are considered to be merely informational in nature, or to be common laudatory phrases or commonly expressed concepts or sentiments that would ordinarily be used in business or in the particular trade or industry, are not registrable. *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at *3 (TTAB 2020) (affirming refusal to register TEXAS LOVE for hats and shirts because “it would be perceived not as a source identifier, but instead as a widely-used phrase that merely conveys a well-recognized and commonly expressed concept or sentiment, specifically love for or from Texas”); *In re Eagle Crest, Inc.*, 96 USPQ2d at 1229 (affirming refusal to register “Once a Marine, Always a Marine” for clothing because it would be perceived as an informational slogan “to express support, admiration or affiliation with the Marines”).

“A critical element in determining whether a term or phrase is a trademark is the impression the term or phrase makes on the relevant public.” *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998). “[E]vidence of the public’s perception

may be obtained from ‘any competent source, such as consumer surveys, dictionaries, newspapers and other publications.’” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015) (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985)). Internet evidence is relevant to show consumer perception. *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007).

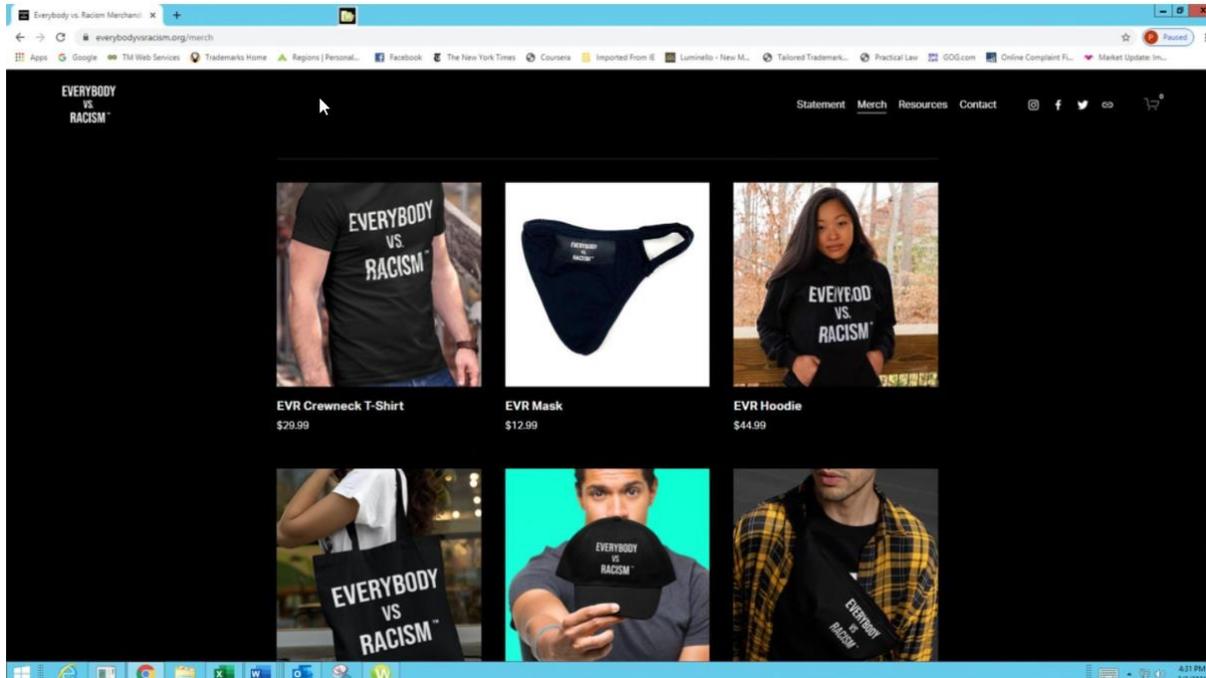
We must assess whether Applicant’s proposed mark, EVERYBODY VS RACISM, functions as a mark based on whether the relevant public, i.e., consumers or potential consumers of Applicant’s goods and services and would perceive EVERYBODY VS RACISM as identifying the source or origin of Applicant’s goods and services. *See e.g. In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, at *1-2 (TTAB 2019) (“The key question is whether the asserted mark would be perceived as a source indicator for Applicant’s [goods or] services.”); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006) (same). Because there are no limitations to the channels of trade or classes of purchasers of the goods and services identified in the application, the relevant consuming public comprises all potential purchasers of the identified Class 18 and 25 goods and Class 35 services. *See University of Kentucky v. 40-0, LLC*, 2021 USPQ2d 253, at *25 (TTAB 2021); *In re Team Jesus LLC*, 2020 USPQ2d 11489, at *3 (TTAB 2020).

Applicant originally filed the application under Section 1(b) of the Trademark Act asserting its intention to use the proposed mark on the identified goods and services. In the first Office Action, the Examining Attorney provided an “Advisory–Potentially

Ornamental Usage” explaining that “registration may be refused on the ground that the applied-for mark as used on the specimen of record is merely a decorative or ornamental feature of the goods” and does not function as a mark.² Applicant subsequently filed an amendment to allege use during prosecution. After accepting the amendment to allege use, the Examining Attorney maintained and made final the failure to function refusal based on the proposed mark being a social or political message.³ We consider Applicant’s specimens of use for each class and the evidence of record showing how the designation is actually used by others in the marketplace. *In re Eagle Crest*, 96 USPQ2d at 1229.

A. Applicant’s Specimens and the Examining Attorney’s Evidence

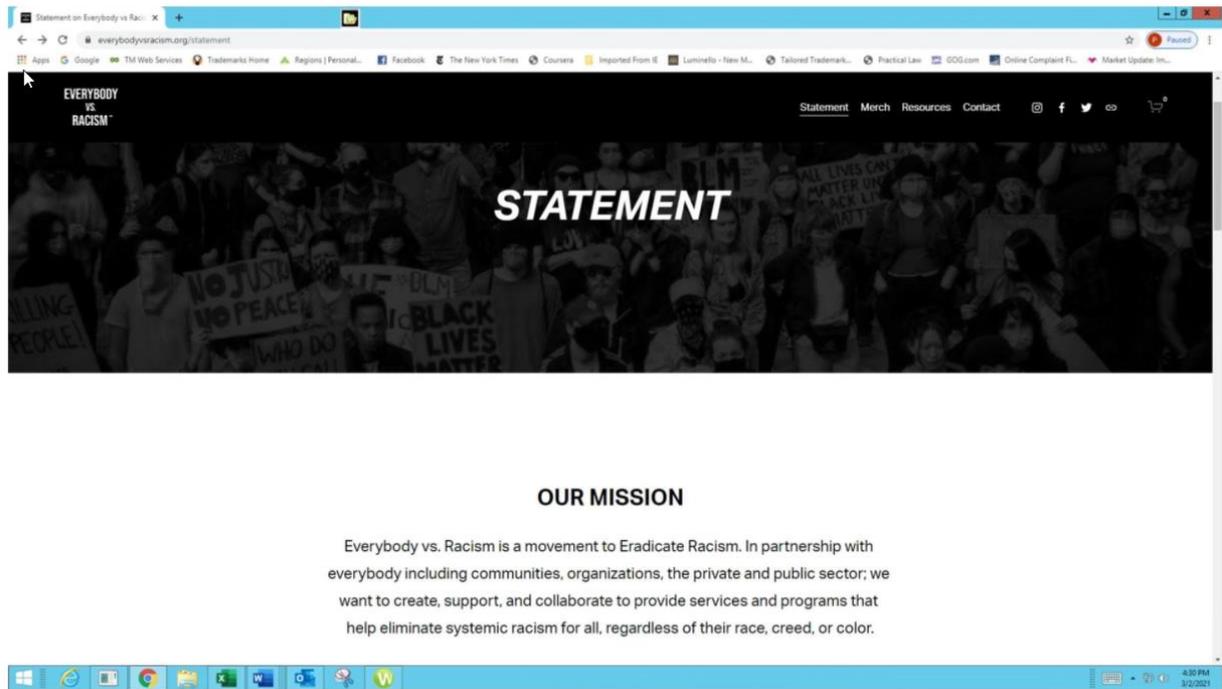
1. Applicant’s use:⁴



² September 3, 2020 Office Action at TSDR 1.

³ March 19, 2021 Office Action at TSDR 1. No ornamental refusal issued.

⁴ March 11, 2021 amendment to allege use at TSDR 2-24.



2. Representative examples of use by third-parties

Third-party use displaying the phrase on clothing, tote bags and mugs include the following:



Five product listings for 'Everybody vs. Racism' merchandise. Each listing includes a photo of the item, a 'More colors' link, a product title, the seller's name, a price, and a star rating with the number of reviews.

- 1. **Everybody vs Racism t-shirt, Short-Slee...** by SeaShellsApparel, \$16.90, 5 stars (4 reviews).
- 2. **Everybody Vs Racism Unisex T-Shirt | E...** by DealsDome, \$18.50, 5 stars (4 reviews).
- 3. **Political Shirts, Anti Racism Shirt, No R...** by Craftelona, \$21.95, 5 stars (20 reviews).
- 4. **Everybody Vs Racism Black Lives Matt...** by DelseeGear, \$28.00 (FREE shipping), 5 stars (360 reviews).
- 5. **Everybody Vs Racism Shirt | Anti Racis...** by LegendInfluence, \$21.97, 5 stars (27 reviews).

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Three images of 'Everybody vs. Racism' merchandise. The first shows a man wearing a black t-shirt with 'EVERYBODY -VS- RACISM' in white. The second shows a black t-shirt with 'EVERYBODY -VS- RACISM' in yellow. The third shows a black cap with 'Everybody vs Racism' in white.

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SHOP



Four product listings for 'Everybody vs. Racism' merchandise. Each listing includes a photo of the item, a product title, and a price.

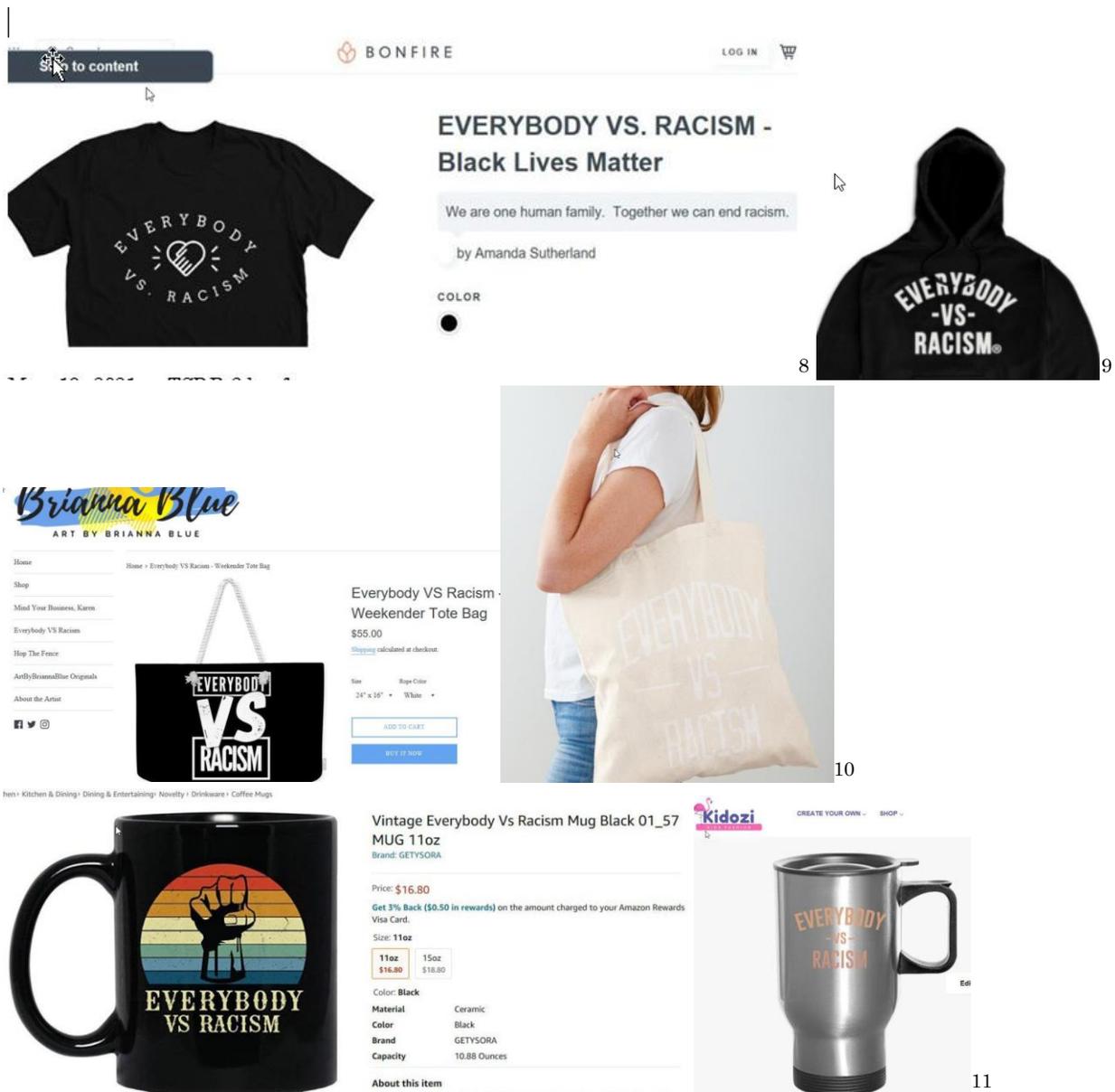
- 1. **Everybody Vs. Racism Black Crew Sweater**, \$37.00.
- 2. **The Everybody Vs. Racism T-Shirt**, \$30.00.
- 3. **Everybody Vs. Racism Racer Tank**, \$29.00.
- 4. **Toddler Everybody Vs. Racism T-Shirt**, \$25.00.

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⁵ September 3, 2020 Office Action at TSDR 23, esty.com.

⁶ *Id.* at TSDR at 12, redbubble.com; at TSDR 19, teepublic.com; March 19, 2021 Office Action at TSDR 34, livingmyalife.com.

⁷ March 19, 2021 Office Action at TSDR 62, suppliesforallies.com.

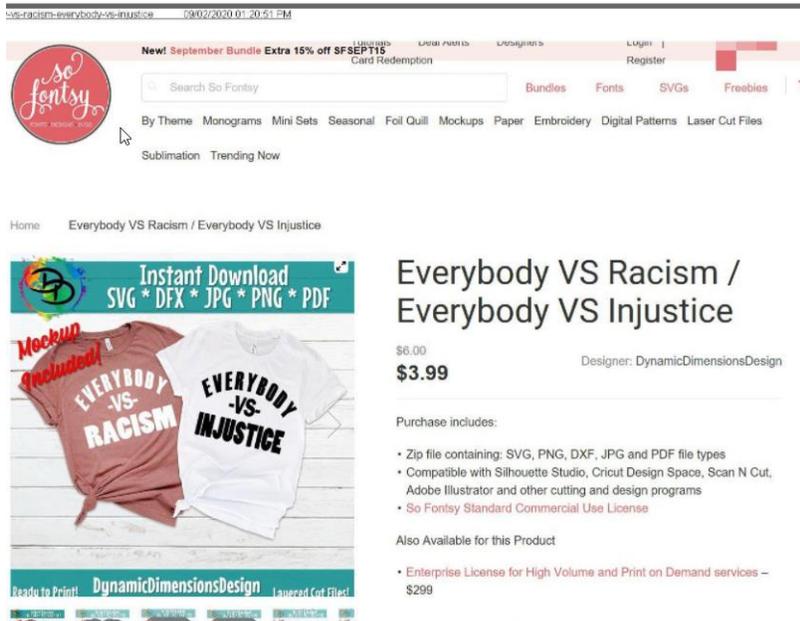


⁸ *Id.* at TSDR 2, bonfire.com.

⁹ September 3, 2020 Office Action at TSDR 2, vseverybody.com.

¹⁰ March 19, 2021 Office Action at TSDR 52, artbybriannablue.com; at TSDR 43, Redbubble.com.

¹¹ *Id.* at TSDR 54, amazon.com; at TSDR 58, kidozi.com.



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Examples of use on websites, social media, editorials, YouTube videos, and stories:

Everybody vs Racism



Another Black casualty in America. Jacob Blake.

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¹² September 3, 2020 Office Action at TSDR 42, softontsy.com.

¹³ *Id.* at TSDR 27, linkedin.com.

¹⁴ *Id.* at TSDR 30, JournalStarNews, youtube.com.



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ETCETERA

Bowens: Detroit, London, Grosse Pointe -- It's Not Black Vs White, It's Everybody Vs Racism

[Tweet](#) [Share](#)

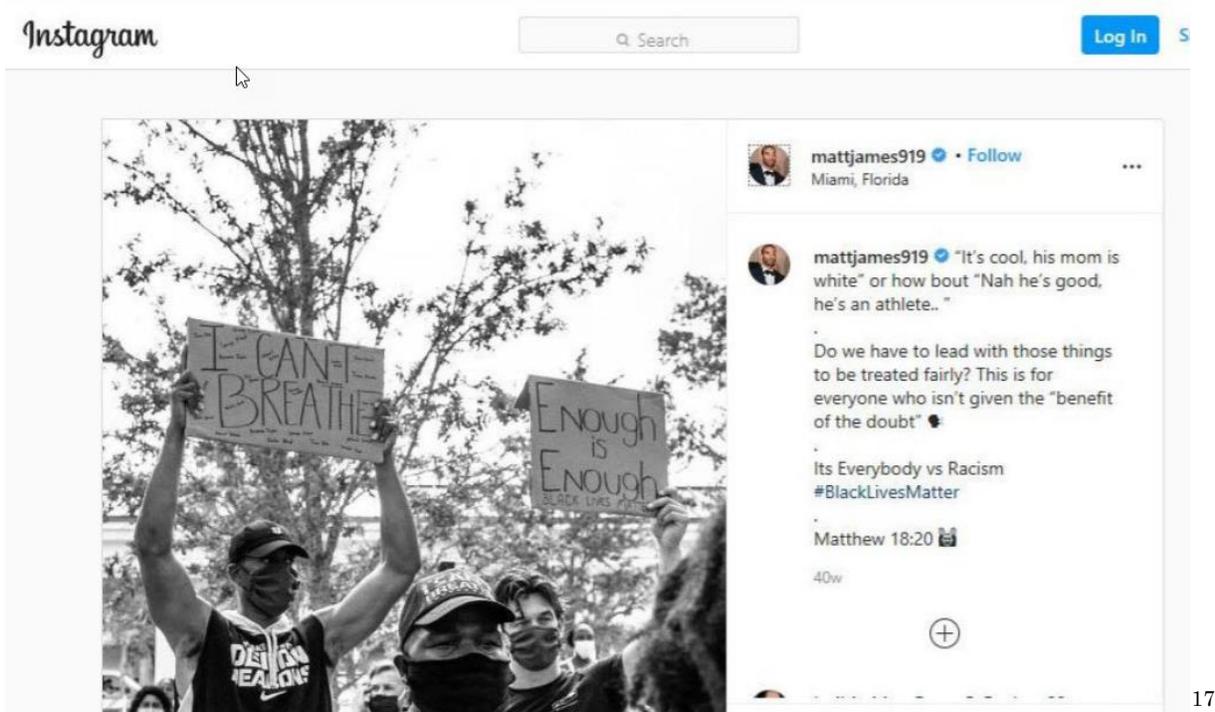
March 11, 2021, 10:26 PM by **Greg Bowens**

Greg Bowens, a Deadline Detroit contributing columnist, is a civil rights activist, public relations professional and former Detroit News reporter. He is co-founder and past president of

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¹⁵ *Id.* at TSDR 50, nbra.net.

¹⁶ March 19, 2021 Office Action at TSDR 17, deadlinedetroit.com.



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NBA REFEREES DONNED “EVERYBODY VS. RACISM” IN HISTORIC WALK OUT

Posted by Compete News Team | Aug 27, 2020 | Compete Network Feature Stories | 0

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Mark Davis: 'It is everybody vs. racism'

NBA official Mark Davis joins to speak on officials' decision to march in support of NBA players' decision to protest.

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¹⁷ *Id.* at TSDR 41, [instagram.com](https://www.instagram.com).

¹⁸ September 3, 2020 Office Action at TSDR 40, [competenetwork.com](https://www.competenetwork.com).

¹⁹ *Id.* at TSDR 32, [nba.com](https://www.nba.com).

²⁰ *Id.* at TSDR 4, [jba.com](https://www.jba.com).

Examples of use as song titles and podcast:

The screenshot shows the Apple Podcasts interface. On the left is a podcast cover with the text 'EPISODE #149 EVERYBODY VS RACISM!!!' and 'BLACK LIVES MATTER'. The main title is 'Episode #149 Everybody Vs Racism!!!' by 'MICHAEL V MARVELOUS PODCAST'. The category is 'Society & Culture'. A description reads: 'Episode #149 Everybody Vs Racism!!! In this episode we talk about Black Lives Matter, how racism is still real and how we feel about DT he is an a racist and horrible leader.' There are two links: 'https://www.youtube.com/user/moneydott32' and 'https://teespring.com/stores/the-llfm-brand-store'. A 'More Episodes' link is at the bottom right. The duration '17 min' is shown at the bottom left.

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The screenshot shows the Amazon Music interface. The song title is 'Everybody Vs. Racism [Explicit]' by 'Yr'. The album cover is dark with the text 'WHY IS CONDEMNING RACISM A DEBATE?'. On the right, there are two buttons: 'Listen Now' and 'Buy MP3 Album \$2.99'. The Amazon Music logo is at the top left.

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The screenshot shows the Spotify interface. The song title is 'Everybody VS Racism' by 'Jah Digga'. It is from the album '2020 • 1 SONG'. There is a green button that says 'PLAY ON SPOTIFY'. To the right, there is a larger graphic with the text 'Everybody Vs. Racism' and 'Lamingo Tomlin' in red, with 'HIP-HOP/RAP • 2020' below it.

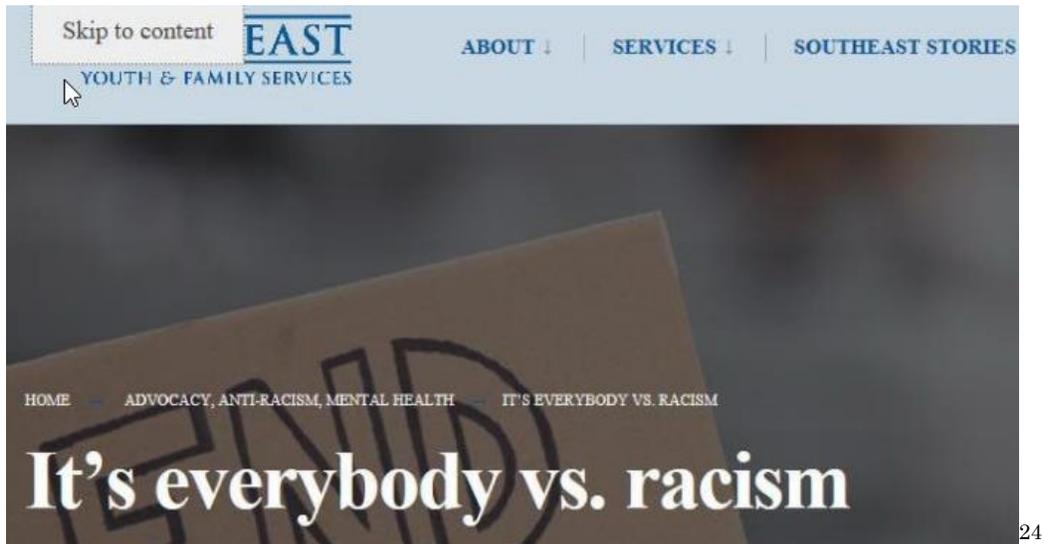
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²¹ *Id.* at TSDR 55, podcast.apple.com.

²² *Id.* at TSDR 35 amazon.com.

²³ *Id.* at TSDR 38 spotify.com; March 19, 2021 Office Action at TSDR 24, music.apple.com.

Examples of use by organizations:



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Service Times Sermons Online Adult Sunday school Our Ministries Contact Us Give Online

Everybody vs. Racism

Sunday, July 05, 2020

Luke 9:52-56

by Bill Secrest



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Interested in Upward Basketball?

We're back for 2021!

Comment/Question

What is *

²⁴ March 19, 2021 Office Action at TSDR 19, seyfs.org.

²⁵ September 3, 2020 Office Action at TSDR 52, aurorabaptist.org.

The anti-racism sentiment is reflected in some of the information provided in connection with the items, or in the opinion pieces:

A website offering t-shirts with the “everybody vs. racism” message states: “The goal is simple. Eliminate Racism. Everybody. Everyday.”²⁶

A website offering t-shirts with the “everybody vs racism” message describes the goods: “this T-shirt is a POLITICAL HOT TREND.”²⁷

A hat that contains the message “everybody vs. racism” on the front displays the message “one human race” on the back.²⁸

A description of an “everybody vs. racism” message t-shirt states: “Meaning of item –when we come together there is nothing that can stop us.”²⁹

A website with a t-shirt containing the “everybody vs. racism” message describes the t-shirt as a “black lives matter” t-shirt.³⁰

A website with a t-shirt containing the “everybody vs. racism” message describes the t-shirt as “Everybody vs. Racism–Black Lives Matter” and includes the statement “We are one human family. Together we can end racism.”³¹

An opinion piece, “Everybody vs. Racism My Money is on Everybody,” by Senior Master Sergeant Shania Porter states: “Historically, the fight has seemed like black versus white but has now become everybody versus racism. And if anything, I have my money on everybody.”³²

²⁶ March 19, 2021 Office Action at TSDR 7, supplies for allies.com.

²⁷ *Id.* at TSDR 33, teeherivar.com.

²⁸ *Id.* at TSDR 34, livingmyalife.com.

²⁹ September 3, 2020 Office Action at TSDR 17, shoprehabtime.com.

³⁰ *Id.* at TSDR 19, teerepublic.com

³¹ March 19, 2021 Office Action at TSDR 2, bonfire.com.

³² September 3, 2020 Office Action at TSDR 4-8, jba.com.

An opinion piece by CEO Darrell Bracken of Logitech, states “This is my humble call to every leader who reads my posts to make this moment your moment to adopt anti-racism. ... It’s time for every organization to begin the process to eradicate racism.”³³

III. Arguments

Applicant argues that “no evidence of record shows that ‘EVERYBODY VS RACISM’ is a widely spread and popularly used informational phrase” and the indirect and circumstantial evidence of consumer perception in the record is mixed. 5 TTABVUE 3. Applicant asserts that there is no doubt that it uses EVERYBODY VS RACISM as a branded mark, as it “heavily promotes and advertises its goods and services,” and uses the “™ symbol.” 5 TTABVUE 4, 5. Applicant argues that the “determining factor” is its specimen, and “the commonness of EVERYBODY VS RACISM is immaterial to gauging its capability to function as a mark.” 5 TTABVUE 4, 9. Applicant asserts that due to its extensive policing efforts, to the extent the public ever saw EVERYBODY VS RACISM as a common slogan, it no longer does. 5 TTABVUE 9. Applicant submits that “the mere fact that EVERYBODY VS RACISM may have seemed to be commonly used in everyday speech at some brief time in the past does not, per se, make it incapable of functioning as a mark today.” 5 TTABVUE 9.

The Examining Attorney argues that the phrase EVERYBODY VS RACISM is a commonly used message used to convey anti-racist sentiment. 6 TTABVUE 7. The Examining Attorney submits that Applicant has argued the wrong standard, focusing

³³ *Id.* at TSDR 28, linkedin.com.

only on its specimen, and that “usage by others that establishes how commonly consumers would encounter the slogan” also is considered. 6 TTABVUE 5, 6. The Examining Attorney maintains that “the standard is not reliant on the manner of the Applicant’s usage” and that evidence of widespread usage by others is “the primary means to establish how consumers would view the slogan.” 6 TTABVUE 16.

The Examining Attorney submits that

The evidence shows widespread usage of the wording in applicant’s mark (or highly similar, derivative, wording) used specifically as a political or social justice informational message: that all people should combat racism, that racism must be fought by everyone as it pervades society as a whole. The message’s succinct, direct impact makes it useful as an informational message – it fits well on tshirts and protest signs, and it sends the message that all people are responsible for combating the ills of racism in society – it lets no one off the hook. The evidence shows that anti-racists have quickly seen the impact of the message and used it, repeatedly, to convey their sentiment. The widespread use throughout the country, as shown by the evidence of record, shows that consumers will gravitate toward the message as an informational battle cry. 6 TTABVUE 12.

IV. Analysis

In cases such as this, “the question is not whether the mark has been associated with the goods [or services] by a particular mode or manner, but whether the matter sought to be registered performs the function of a trademark [or service mark] by signifying to purchasers the source of the goods [or services] sold or offered for sale.” *D.C. One Wholesaler*, 120 USPQ2d at 1716 (citing *In re Paramount Pictures Corporation*, 213 USPQ 1111, 1115 (TTAB 1982)).

Matter that is widely used to convey ordinary or familiar concepts or sentiments, or social, political, religious, or similar informational messages that are in common use, would not be perceived as indicating source and are not registrable. *See In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *1 (TTAB 2020). Third party use, in addition to Applicant's use, is relevant in considering this refusal because "widespread ornamental use of the phrase by third parties 'is part of the environment in which the [mark] is perceived by the public and ... may influence how the [mark] is perceived.'" *D.C. One Wholesaler, Inc.*, 120 USPQ2d at 1716 (citing *In re Hulting*, 107 USPQ2d 1175, 1178 (TTAB 2013), quoting *In re Tilcon Warren Inc.*, 221 USPQ 86, 88 (TTAB 1984)). In particular, "[c]ommon use of a phrase by third parties merely for the purpose of imparting information makes it less likely that the public will perceive it as identifying a single commercial source and less likely that it will be recognized by purchasers as a trademark." *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1153 (TTAB 2019). Therefore, Applicant's argument that "[t]he determining factor, ... is the manner in which the mark is actually used by the Applicant and that third-party use is immaterial," (5 TTABVUE 4, 9), is not persuasive.

The evidence provided by the Examining Attorney shows that "everybody vs racism" is commonly used in an informational and ornamental manner on clothing items, tote bags, and other retail items sold by third-parties to convey an anti-racist sentiment. The slogan "everybody vs racism" also been used to convey an anti-racist sentiment in opinion pieces, in music, podcasts, and YouTube videos, and by organizations (websites) that support efforts to eradicate racism.

Applicant criticizes the “indirect and circumstantial evidence of record” as having “no probative value” because it shows “use of EVERYBODY VS RACISM in other contexts unrelated to Applicant’s goods and services.” 5 TTABVUE 9. However, in prior Board cases, we have found because “the consumer perception of the message ... determine[s] whether or not the proposed mark could identify a single source and thus be registrable,” “*any* evidence demonstrating widespread use of the wording is relevant.” *In re Deporter*, 129 USPQ2d 1298, 1302 (TTAB 2019) (emphasis in original).

Applicant also challenges the competency of the evidence arguing that “[t]he indirect and circumstantial evidence of record is at best mixed regarding how consumers in general perceive EVERYBODY VS RACISM in connection with Applicant’s goods and services.” 5 TTABVUE 3. Applicant submits that “the mere fact that EVERYBODY VS RACISM might be currently used in a few contexts in a non-trademark manner (e.g. the title of rap songs, used as the subject matter of various articles, podcasts, church sermons, YouTube videos, etc.) does not render it incapable of functioning as a mark for Applicant’s goods and services.” 5 TTABVUE 9.

However, Applicant, has not identified any trademark uses in the third-party evidence submitted by the Examining Attorney. We find the entirety of the evidence provided by the Examining Attorney shows wide use of the proposed mark in a non-trademark manner to consistently convey an informational, anti-racist message to the public.

Applicant also challenges the amount of evidence submitted by the Examining Attorney, arguing that “no evidence of record shows ‘that EVERYBODY VS RACISM’ is a widely spread and popularly used informational phrase.” 5 TTABVUE 3. But there is no specific rule as to the exact amount of evidence necessary to prove informational use. *Cf. Hunter Publishing Co. v. Caulfield Publishing Ltd.*, 1 USPQ2d 1996, 1999 (TTAB 1986) (“[e]valuation of the evidence requires a subjective judgment as to its sufficiency based on the nature of the mark and the conditions surrounding its use.”). We find that the evidence submitted by the Examining Attorney is sufficient to show widespread use.

Considering the Examining Attorney’s third-party evidence, we find that consumers would perceive EVERYBODY VS RACISM as merely an informational anti-racist message that everyone—every person, institution or organization should support the fight against racism. The commonplace meaning imparted by the phrase EVERYBODY VS RACISM would be the meaning impressed upon the purchasing public, and it would not be perceived as a service mark or trademark. Clothing and tote bags imprinted with EVERYBODY VS RACISM will be purchased by consumers for the informational message it conveys. *In re Eagle Crest Inc.*, 96 USPQ2d at 1230. Therefore, consumers accustomed to seeing this phrase displayed on clothing, tote bags and other retail items from many different sources would not view the slogan as a trademark indicating source of the clothing or tote bags only in Applicant. *Id.*

As to Applicant's services, consumers would perceive EVERYBODY VS RACISM as merely an informational statement against racism rather than a service mark for "promoting public interest and awareness of the need for racial reconciliation and encouraging people to know their neighbor and then affect change in their own sphere of influence." Thus, the commonplace meaning and anti-racist message imparted by the phrase would be the meaning impressed upon the purchasing or consuming public.

The manner of use on Applicant's Class 18 and Class 25 goods, reinforces EVERYBODY VS RACISM as an informational statement or message. Applicant's specimens of use for Classes 18 and 25 consist of photographs of t-shirts and sweatshirts and a tote bag, each displaying Applicant's proposed mark in large, prominent lettering across the front or center of each item. The placement, size, and dominance of the wording emblazoned on Applicant's goods are consistent with informational (or ornamental), non-trademark use and more consistent with the conveying of an informational message than with signifying a brand or source indicator. See *In re Hulting*, 107 USPQ2d at 1179; *University of Kentucky v. 40-0, LLC*, 2021 USPQ2d 253, at *32 ("the large letters on Applicant's T-shirts are a relevant consideration ... indicating that consumers purchase the T-shirts for the message emblazoned across the front.").

Applicant argues that its use of EVERYBODY VS RACISM on the Class 18 and Class 25 goods is "used in the manner of the mark" and "identifies its Class 35 services as a secondary source." 5 TTABVue 5. However, secondary source is

inapplicable and irrelevant to refusals based on informational matter that fails to function as a source indicator. See *In re Mayweather Promotions*, 2020 USPQ2d 11298, at *5-6; *In re T.S. Designs, Inc.*, 95 USPQ2d 1669, 1672 (TTAB 2010) (rejecting applicant’s attempts to rely on the theory of secondary source because there was “no factual parallel ... to reported decisions where ornamental material on the clothing tells the purchasing public the source of the goods”).

As to the Class 35 services, Applicant has demonstrated use in the manner of a service mark. However, the fact that Applicant displays the mark as a service mark does not require a different result because the question is whether the proposed mark functions as a source indicator, not whether the proposed mark has been associated with the goods or services by a particular mode or manner. *D.C. One Wholesaler*. 120 USPQ2d at 1716 (“The fact that Respondent has sometimes displayed I ♥ DC on hangtags and labels, in a non-ornamental manner that is conventional for the display of trademarks, does not require a different result.”); *In re Team Jesus LLC*, 2020 USPQ2d 11489, at *5 (same) (quoting *D.C. One Wholesaler*, 120 USPQ2d at 1716).

Here we find EVERYBODY VS RACISM displayed on Applicant’s website conveys information that Applicant supports anti-racism efforts. The webpage with Applicant’s “mission statement” for Class 35 services confirms the informational nature of the phrase EVERYBODY VS RACISM as a social and political slogan:

Everybody vs. Racism is a movement to Eradicate Racism. In partnership with everybody including communities, organizations, the private and public sector; we want to create, support and

collaborate to provide services and programs that eliminate systemic racism for all regardless of their race, creed or color.³⁴

See *In re Walmart*, 129 USPQ2d at 1152 (the text on Applicant’s website confirms the merely informational nature of the phrase).

Applicant argues that it “regularly uses the ‘tm’ symbol in conjunction with EVERYBODY VS RACISM” “as a branded term” “in much of its marketing material, through Facebook and social media accounts.”³⁵ 5 TTABVUE 4. However, use of the “TM” symbol cannot transform an otherwise unregistrable designation into a registrable mark. *University of Kentucky v. 40-0, LLC*, 2021 USPQ2d 253, at *32; *In re Eagle Crest Inc.*, 96 USPQ2d at 1231; “Applicant’s ‘mere intent that a term function as a trademark is not enough in and of itself, any more than attachment of the trademark symbol would be, to make a term a trademark.” *In re Aerospace Optics*, 78 USPQ2d at 1864 (quoting *In re Manco Inc.*, 24 USPQ2d 1938, 1942 (TTAB 1992)).

Applicant also references its search optimization and “extensive efforts since May 2020, to police unauthorized use of EVERYBODY VS RACISM (which efforts continue to this day).” 5 TTABVUE 6. Applicant asserts that these efforts “have altered any non-source identifying perception of EVERYBODY VS RACISM to such a degree that the public no longer sees it (assuming arguendo that it ever did at all) as a common slogan that merely conveys an anti-racist sentiment” but perceives it as the source of Applicant’s goods and services. 5 TTABVUE 6.

³⁴ March 11, 2021 Response to Office Action at TSDR 1.

³⁵ Applicant also references Kacey Musgrave’s Twitter account, as evidence of public recognition of its marks but as indicated above, we have excluded this evidence.

However, the submitted graph showing trends in the popularity of the Google search for EVERYBODY VS RACISM does not make the evidence of informational use submitted by the Examining Attorney any less probative. The question is not how often a term is searched over a period of time, but its impact on consumer perception. Analytic results as to the popularity of a particular search term is not proof of consumer perception that EVERYBODY VS RACISM functions as a trademark or service mark.

As to Applicant's policing activities, these efforts have little bearing upon the analysis of the understanding by the public of the term sought to be registered. *See In re Volvo White Truck Corp.*, 16 USPQ2d 1417, 1423 (TTAB 1990) (Simms, dissenting) citing *In re Dana Corporation*, 12 USPQ2d 1748, 1750 (TTAB 1989) (the fact that a third-party acceded to applicant's claims that its model, style or grade designations were trademarks "does nothing to enhance the registrability of the terms involved herein" as to whether they function as marks). Even if third-parties may have agreed to discontinue use of EVERYBODY VS RACISM upon threat of legal action by Applicant, such action shows a desire by those third-parties to avoid litigation, rather than demonstrating recognition of the term as a trademark or service mark. *See In re Wella Corp.*, 565 F.2d 143, 196 USPQ 7, 8 n.2 (CCPA 1977).

Applicant argues that the seemingly common use of EVERYBODY VS RACISM "in everyday speech at some brief time in the past does not, per se, make it incapable of functioning as a mark today." 5 TTABVUE 9. We disagree. We find that the submitted specimens and Google search trend evidence are not sufficient to show that

EVERYBODY VS RACISM has trademark and service mark significance and consumers no longer perceive it as conveying an informational message.

Lastly, Applicant argues that the failure to function refusal must be “strictly construed” and should no longer be a complete bar to registration, just as the Office no longer refuses scandalous and immoral marks.

To the extent Applicant is making a constitutional argument, we have no authority to consider it. *In re Gov’t of the District of Columbia*, 101 USPQ2d 1588, 1603 (TTAB 2012). The Trademark Trial and Appeal Board is an administrative tribunal, not an Article III court, and we cannot declare provisions of the Trademark Act, or provisions of the Trademark Act as applied in this context, unconstitutional. *Id.* Under current case precedent and Office practice, applications involving informational matter remain a bar to registrability. *See e.g., In re Team Jesus*, 2020 USPQ2d 11489, at *6 (a term used by multiple third parties that merely conveys a well-recognized concept or sentiment is unregistrable.); Trademark Manual of Examining Procedure (TMEP) § 1202.04 (July 2021).

As aptly put by the Examining Attorney:

Just as the sentiment that “thoughts and prayers” should be sent to victims of gun violence are cyclical, with the sentiment being expressed in the wake of mass shootings, the phrase “EVERYBODY VS RACISM” is cyclical. It has, and will continue, to be used in the wake of widely publicized racist incidents. Sadly, it is unlikely that the George Floyd killing will be the last racially inspired killing of a black man in this country. Sadly, there will likely be another incident before too long that will re-ignite the public’s passion and inspire people to again express their desire for a unified attack against racism. Sadly, the need to be able to express that one believes everyone should

be against racism will arise again. Those who wish to be able to express that sentiment should be free to do so without paying a licensing fee to someone who sees an opportunity to co-opt a political message by filing for a registration for that message.³⁶

V. Conclusion

Based on the record in this case, Applicant's proposed mark EVERYBODY VS RACISM fails to function as a mark for Applicant's Class 18 and 25 goods and Class 35 services. EVERYBODY VS RACISM would be perceived by consumers as a widely used social and political message and therefore merely informational in nature, as opposed to a source-indicator of Applicant's goods and services.

Decision: The refusal to register Applicant's applied-for mark EVERYBODY VS RACISM is affirmed as to all classes of goods and services.

³⁶ 6 TTABVUE 14.